89-1767

No.

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CHESTER A. WILK, D.C.,
JAMES W. BRYDEN, D.C.,
PATRICIA B. ARTHUR, D.C., and
MICHAEL D. PEDIGO, D.C.,

Petitioners,

v.

THE JOINT COMMISSION ON ACCREDITATION OF HOSPITALS, THE AMERICAN MEDICAL ASSOCIATION, and THE AMERICAN COLLEGE OF PHYSICIANS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PAUL E. SLATER
CHRISTOPHER J. MURDOCH
SPERLING, SLATER & SPITZ
3300 Xerox Centre
55 West Monroe Street
Chicago, Illinois 60603
(312) 641-3200

GEORGE P. MCANDREWS
(Counsel of Record)
ROBERT C. RYAN
McANDREWS, HELD & MALLOY, LTD.
Northwestern Atrium Center
500 West Madison Street
Chicago, Illinois 60606
(312) 707-8889

Counsel for Petitioners

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTIONS PRESENTED FOR REVIEW

1. Whether the appellate court erred in holding that a private standard-setting trade association does not combine or conspire within the meaning of § 1 of the Sherman Act when it promulgates hospital-accreditation standards, requiring medical physicians and hospitals to boycott and exclude all doctors of chiropractic.

2. Whether the appellate court erred in holding that under *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982), a standard-setting trade association is not responsible for a violation of § 1 of the Sherman Act when its dominant member prepares an unreasonably anticompetitive industry standard and "manipulates" the association to adopt it so as to "promote and expand" an illegal boycott organized by the member.

3. Whether the appellate court erred in holding that a standard-setting trade association does not combine or conspire with its dominant member within the meaning of § 1 of the Sherman Act when the member drafts and requests that the association adopt an unreasonably anticompetitive standard; the association complies with the request by adopting the proposed standard verbatim; and, the association's agents then knowingly enforce the standard and "cooperate" with the member to exclude competitors from the market.

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REPORT OF OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 895 F.2d 353 (Wilk II). (App. 1a.) The opinion of the United States District Court for the Northern District of Illinois is reported at 671 F. Supp. 1465. (App. 52a.) Prior opinions of the Seventh Circuit, preceding the trial on remand, are reported at 719 F.2d 207 (1983) ("Wilk I"), *op. denying rehearing* 735 F.2d 217 (1983), *cert. denied*, 467 U.S. 1210 (1984).

GROUNDS FOR JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101(c). The court of appeals' Judgment and Opinion were entered February 7, 1990. (App. 1a, 50a.)

STATUTES INVOLVED

The statutes involved are §1 of the Sherman Act, 15 U.S.C. §1, and §16 and of the Clayton Act, 15 U.S.C. §26. They are set forth in the Appendix. (App. 164a.)

STATEMENT OF THE CASE

A. History Of The Litigation

This is an antitrust suit brought pursuant to §1 of the Sherman Act for injunctive relief only. The petitioners, four doctors of chiropractic, filed suit against the American Medical Association ("AMA"), the Joint Commission on Accreditation of Hospitals ("JCAH"), and a number of other medical associations[1] alleging that defendants had

[1] The other defendants were the American Hospital Association ("AHA"), the American College of Surgeons ("ACS"), the American College of Physicians ("ACP"), the American College of Radiology ("ACR"), the American Academy of Orthopaedic Surgeons ("AAOS"), the American Osteopathic Association ("AOS"),

(Footnote continued on following page)

entered into a nation-wide conspiracy to prevent chiropractors from competing against medical doctors.

On January 30, 1981, following an eight week trial, a jury returned a verdict in favor of the defendants. On September 19, 1983, the Seventh Circuit Court of Appeals reversed the judgment and remanded for re-trial. (Wilk I.)

The case was re-tried in a bench trial before the Honorable Judge Susan Getzendanner. On September 25, 1987, Judge Getzendanner held that the AMA and certain other defendants had violated §1 of the Sherman Act, and granted petitioners injunctive relief. (App. 52a).

With regard to the JCAH, however, the trial court held that no liability had been proved. (App. 109a-10a.) Specifically, the trial court held that the JCAH had not conspired with the AMA or participated in any other combination or conspiracy within the meaning of §1 of the Sherman Act. (App. 97a-110a.) Judge Getzendanner thus dismissed the claims against the JCAH. (App. 110a.)

The AMA appealed the judgment against it to the Seventh Circuit Court of Appeals. The petitioners cross-appealed against the JCAH.

In the cross-appeal, petitioners asserted that the trial court erred, as a matter of law, by: (1) refusing to hold that the hospital accreditation standards promulgated by the JCAH, a private standard-setting association, constituted a combination or conspiracy; (2) holding that the

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[1] *continued*
the American Academy of Physical Medicine and Rehabilitation ("AAPMR"), the Illinois State Medical Society ("ISMS"), Chicago Medical Society ("CMS") and a number of individuals. (App. 53a.) The AAPMR, ISMS, CMS, and AHA settled prior to the close of the second trial. The AAOS, ACR, and ACS settled after the trial court (second trial) issued an opinion finding that they had violated the antitrust laws. *Wilk v. AMA*, 1987-2 Trade Cases ¶ 67,689 (N.D. Ill. 1987) (pre-settlement op.); see also App. 116a-34a.

adoption and enforcement of an accreditation standard that the AMA drafted and sent to the JCAH with a request that it be adopted (which standard made it unethical and grounds for non-accreditation for a hospital to professionally associate with a chiropractor) did not constitute a conspiracy between the AMA and JCAH; and (3) holding that the JCAH was not liable for the illegal acts that its member, the AMA, implemented through the JCAH accreditation standards.

The Seventh Circuit affirmed the judgment against the AMA. (App. 2a.) It also affirmed that the JCAH "did not participate in the AMA's boycott, or in any other way violate §1." (App. 49a.)

B. The Facts Found and Affirmed

Petitioners do not challenge any of the trial court's findings of fact. Petitioners contend only that the legal conclusions reached below conflict with decisions of this Court and other courts of appeals. The pertinent facts, as found by the district court and affirmed by the appellate court, are set forth below.

1. Facts Pertaining To The AMA

The AMA is a professional association of medical physicians. (App. 11a, 73a.) Its members constitute a majority of all medical physicians in the United States, and it possesses "substantial market power." (App. 11a.)

Chiropractors, including petitioners, are licensed health care providers who specialize in the treatment of musculoskeletal ailments, particularly back pain. (App.18a-19a, 72a.) Many medical physicians treat these same conditions and are in direct competition with chiropractors. (*Id.* 120a, 129a.)

In the early 1960's the AMA became concerned that medical physicians were cooperating with chiropractors in the treatment of patients. (App. 61a.) In order to end this

cooperation and eliminate the entire chiropractic profession, the AMA formed the Committee on Quackery in November 1963. (App. 3a-4a, 61a.) The trial court found that the Committee's "goal" was "the complete elimination of the chiropractic profession."[2] (App. 61a.) The appeals court affirmed the district court's finding. (App. 3a-4a.)

In furtherance of its goal, in 1966 the AMA adopted an anti-chiropractic resolution that labeled chiropractic as an "unscientific cult." (App. 4a.) The trial court found that the label "implicitly invoked Principle 3 of the AMA's Principles which made it unethical for a physician to associate with an unscientific practitioner." (App. 62a.)

One year later, in 1967, the AMA Judicial Council issued an opinion under Principle 3 explicitly stating that it was unethical for any physician to professionally associate with a chiropractor. (App. 62a-63a.) This opinion and the anti-chiropractic resolution made it unethical for a medical physician to refer a patient to a chiropractor, accept a referral from a chiropractor, provide diagnostic, laboratory, or radiology services to a chiropractor, teach at a chiropractic school or seminar, or engage in any group practice or partnership with a chiropractor. (*Id.*)

The trial court found that the AMA "regularly communicated with medical . . . associations, warning that professional association between medical physicians and chiropractors was unethical." (App. 62a.) In those communications, the AMA used its anti-chiropractic resolu-

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[2] The trial court found that the Committee "repeatedly described [its] prime mission to be the containment and elimination of chiropractic." (App. 61a.) On January 4, 1971, the Committee reported to the AMA Board of Trustees: "Since the AMA Board of Trustees decision, at its meeting on November 2-3, 1963, to establish a Committee on Quackery, your committee has considered its prime mission to be, first, the containment of chiropractic, and, ultimately, the elimination of chiropractic." (PX 464. *See also*, PX 466, PX 188.)

tion as the "necessary tool" to spread the boycott to other medical groups.[3] (App. 63a.)

The trial court found that the Committee on Quackery had succeeded in impeding the growth of chiropractic (App. 73a-74a); raising the chiropractors' costs; interfering with consumers' freedom of choice; preventing medical physicians from referring patients to chiropractors; preventing chiropractors from improving their professional education (App. 74a-75a, 126a-27a); reducing the demand for chiropractic services; adversely affecting income of chiropractors; and injuring the professional reputation of chiropractors. (App. 76a-78a.) The Seventh Circuit affirmed these findings. (App. 3a-4a, 5a, 11a-13a, 16a, 20a-22a.)

Both lower courts held that these effects were unreasonably anticompetitive and violated the rule of reason. (App. 72a-76a, 12a-16a.) Both courts also held that even though the AMA boycott ended in 1980 (four years ***after*** this case was filed), that it continued to have lingering anticompetitive effects through the date of trial and that, without an injunction, there was a dangerous likelihood that the AMA would repeat its illegal assault on chiropractic. (App. 25a-28a, 30a-32a, 92a-97a, 139a-41a.) As a result, both courts held injunctive relief was required. (*Id.*)

2. Facts Pertaining To The JCAH

One of the associations that the AMA contacted in the course of its anti-chiropractic campaign was the JCAH. (App. 38a, 64a.) Like the AMA, the JCAH is a private membership trade association. (App. 37a, 99a-100a.) Its

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[3] In 1971 the Committee on Quackery reported to the AMA Board of Trustees that the anti-chiropractic resolution "was the necessary tool with which your Committee has been able to widen the base of its chiropractic campaign. With it, other health related groups were asked and did adopt the AMA policy statement or . . . versions of it. (PX 464)." (App. 63a.)

primary purpose is to promulgate and enforce industry standards for the accreditation of hospitals. (*Id.*)

During the pertinent time period, the constituent members of the JCAH were three medical physician trade associations and a hospital trade association. (*Id.*) The two dominant members of the JCAH were (and remain) the AMA and the AHA. (*Id.*) The other members were the ACS (a co-defendant found guilty before settlement[4]) and the ACP. (*Id.*) The JCAH is governed by a twenty-two member Board of Commissioners (*Id.*). The AMA appoints seven (7) of those commissioners as does the AHA. (App. 100a.) The ACS and ACP appoint three each, and, more recently, American Dental Association one.[5] (*Id.*) The vast majority of the JCAH commissioners are practicing medical physicians. (PX 7106; Tr. 2558-59.)

The JCAH accredits 77% of all U.S. hospitals which have 94% of all hospital admissions. (PX 7329.) The trial court found that JCAH accreditation is extremely important. (App. 38a, 100a.) Its loss or denial is economically devastating and "can close a hospital." (*Id.*) As a result, the JCAH has great power that it can use to prevent competition. Thus, the trial court held that the JCAH "has the power to define and regulate the activities which take place in hospitals and to eliminate or frustrate competition from non-medical physician health care providers." (App. 100a.)

In 1964 (five months after the AMA formed the Committee on Quackery), the Executive Director of the JCAH

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[4] See *Wilk v. AMA*, 1987-2 Trade Cases at 58,556 (pre-settlement op.).

[5] The number of commissioner appointments available to each member was chosen in order to maintain a "balance of power" amongst the group. "By balance of power I mean the votes which made decisions . . . the AMA, AHA, the College of Physicians, College of Surgeons." (Porterfield (of JCAH) Tr. 47-49.)

stated in the nationally-circulated AHA Journal: "The Commission looks on Doctors of Chiropractic as cultists. A hospital that encourages cultists to use its facilities in any way would very probably be severely criticized and lose its accreditation." (App. 143a, 38a, 100a-01a.)

The JCAH statement—labeling chiropractors as cultists and stating a hospital would lose its accreditation if it allowed chiropractors to use its facilities—was re-published by the JCAH and AHA, jointly, in a hospital accreditation manual. (App. 101a; PX 828A.) 21,000 copies of the manual were distributed to 6,400 hospital and other medical institutions throughout the United States. (Trial I Tr. 5306 (admitted at the second trial).) Those manuals have never been recalled or withdrawn. (Trial I Tr. 5309.)

In 1970 the JCAH revised its Accreditation Manual for Hospitals. (App. 38a, 101a.) During the revision process, the AMA Judicial Council drafted a proposed standard (App. 163a); sent it to the JCAH; and urged the JCAH to adopt it. (App. 64a, 101a.) The JCAH complied and adopted the AMA's proposed standard, verbatim, as JCAH Accreditation Manual Standard X. (App. 38a, 64a, 101a.)

Standard X required that each hospital insure that every member of its medical staff observe the principles of medical ethics. (*Id.*, 163a) Standard X further provided that failure to do so "shall constitute grounds for non-accreditation."[6] (*Id.*) As a source reference for "medical ethics" the JCAH Accreditation Manual listed the AMA Principles of Medical Ethics. (*Id.*) Principle 3 of these AMA Medical Ethics stated that it was unethical to associate

[6] Standard X states, "The governing body shall require that each member of the medical staff observe all the ethical principles of his profession. Failure by the medical staff and the governing body to insure adherence to these ethical principles shall constitute grounds for non-accreditation." (App. 163a, PX 72.)

with an unscientific practitioner, and the JCAH and the AMA had already issued policy statements declaring chiropractors to be unscientific cultists. (App. 38a, 100a-01a.)

The trial court found that "the AMA drafted Standard X which incorporated the unscientific practitioners ethics bar into the JCAH hospital accrediting standard." (App. 64a.) The trial court also found that "the AMA urged the JCAH to adopt Standard X and JCAH complied." (*Id.*) The trial court concluded that "undoubtedly JCAH was manipulated by the AMA to promote and expand its boycott—getting JCAH to adopt Standard X is but one example." (App. 103a.) According to the trial court, the AMA did this because "keeping chiropractors out of hospitals was one of the goals of the boycott."[7] (App. 64a.)

After the JCAH promulgated Standard X, it routinely responded to hospital inquiries concerning chiropractors by stating "that JCAH would withdraw accreditation of a hospital that had chiropractors on its medical staff or that granted privileges to chiropractors." (App. 38a, 101a-02a.) For example, the JCAH advised Rice Memorial Hospital that any association with a chiropractor "would be in violation of the principles of medical ethics published by the American Medical Association that is also a requirement of the Joint Commission on Accreditation of Hospitals."[8] (App. 151a.) It is admitted that the agents

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[7] The economic expert witnesses for both petitioners and respondents agreed that the hospital ban on privileges for chiropractors and the denial of access to hospital services was significantly anticompetitive, raised chiropractors costs, and injured all chiropractors. (Tr. 408-12, 1417-18, 1457, 1478-79; App. 74a, 133a.)

[8] See also, letter from the JCAH, on JCAH stationery, to Bon Secours Hospital:

> The Joint Commission has no provisions in its standards which would allow a chiropractor to become a member of a medical and dental staff, or to have medical staff privileges in an accredited hospital. I am attaching a copy of an article titled

(Footnote continued on following page)

of the JCAH who answered these inquiries had both actual and apparent authority to do so. (Tr. 1681-87.)

In 1973 Dr. Kessler, Director of the JCAH Hospital Accreditation Program, "cooperated" with the AMA in the preparation and publication of "The Right and Duty of Hospitals To Exclude Chiropractors" which appeared in the Journal of the American Medical Association. (App. 43a, 102a.) The article states that hospitals have "a duty to refuse to grant staff privileges to chiropractors" because they are "cultist practitioners." (App. 153a-54a.) It also states that a hospital that deals with a chiropractor will lose its accreditation. (App. 157a-58a.)

This lawsuit was filed in 1976. (App. 53a.) Four years later, the JCAH deleted Standard X and commenced a revision of its standards. (App. 39a, 103a.) As a replacement for Standard X, the JCAH proposed that each hospital be allowed to decide for itself whether to grant chiropractors privileges. (App. 69a.) Initially, the AMA and AHA, fearing that a more restrictive standard would violate the antitrust laws, supported this proposal. (*Id.*; PX 7120, 7159, 7183 at 9, 7186 at 4, 7192, 7196, 7269, 7272 at 2, 7099; Tr. 2024.) The AMA membership, however, revolted and accused the AMA of failing to support its constituency—medical physicians. (App. 69a; PX 7103, 7161-68, 7099-100.) The AMA succumbed to pressure from its

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[8] *continued*

'The Right and Duty of Hospitals to Exclude Doctors of chiropractic' published in the November 12, 1973 issue of the *Journal of the American Medical Association*, for your information. You may obtain considerable pertinent data about chiropractic by writing to Mr. Roger Olin, Director, Department of Hospitals and Health Facilities, American Medical Association . . . .

Sincerely, Donald L. Kessler, M.D., DLK:acd, encls.
[Director of JCAH Hospital Accreditation Program]
bcc: Roger Olin, AMA, C.Y. Shu, M.D., AHA,
J.D. Porterfield, M.D., JCAH.

(App. 149a. See also App. 143a-60a.)

membership and actively opposed the JCAH proposal. (App. 69a; PX 7100, 7173-77, 7230; Tr. 1584-85.)

As an alternative, the AMA then proposed a new standard requiring a hospital to have an Executive Committee, the majority of which had to be medical physicians, that would be given *sole* authority to recommend hospital privileges for all health care providers.[9] (App. 39a-40a, 69a; Tr. 1737, 2572-74; PX 7111, 7133 at 44, 7275.) The JCAH adopted this proposal, and the power of medical physicians to decide whether a chiropractor could obtain hospital privileges and services was perpetuated. (App. 39a-40a, 69a; PX 7282 at 29, 7283.)

C. The Rulings Of Law Pertinent To The JCAH's Participation In A Combination Or Conspiracy

At trial, petitioners asserted that the JCAH entered into a combination or conspiracy pursuant to three legal theories. First, petitioners argued that the JCAH was liable as a participant in the AMA conspiracy under *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982), because the AMA used the JCAH as the mechanism through which it effectuated its illegal scheme. Secondly, petitioners argued that the JCAH had directly combined and conspired with the AMA. Thirdly, petitioners argued that the JCAH, as a membership trade association, necessarily acts as a con-

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[9] Federal regulations provide that, *if* the hospital has an Executive Committee, a majority of it must be medical physicians. *Nothing* in the regulations, however, requires that there must be an Executive Committee, or that this Committee must have *sole responsibility* for recommending staff privileges or access to hospital resources. In fact Medicare regulations *expressly provide* that chiropractors can care for patients and utilize x-ray facilities in hospitals. 42 C.F.R. § 482.26(6)(a), 48.12(c)(i)(v).

spiracy or combination when it promulgates an industry standard.[10]

The trial court failed to address petitioners' third theory. (App. 36a.) On appeal the Seventh Circuit, relying on *Consolidated Metal Products, Inc. v. American Petroleum Institute*, 846 F.2d 284, 293-94 (5th Cir. 1988), held that a trade association—even one that involves "collective action by competitors"—does not necessarily engage in a combination, or conspiracy simply by promulgating an industry standard.[11] (App. 41a.)

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[10] Petitioners did not contend, of course, that every JCAH standard violates the Sherman Act. Petitioners argued only that those standards that unreasonably restrain competition violate the law. *See* Areeda, Antitrust Law §1477, p. 343 (1983).

[11] The Seventh Circuit alternatively held that, even if the JCAH standards constituted a conspiracy in and of themselves, that petitioners failed to prove threatened injury from that limited conspiracy. (App. 41a.) The district court did not reach this issue and made no such finding. (App. 109a-10a.) On the contrary, there was voluminous evidence that each plaintiff-petitioner had been denied access to hospital facilities because of the exclusionary JCAH standards. (E.g., Tr. 592-603, 897-907; PX 1822, 1818-19, 1808; Colburn Tr. 3-5, 10, 15, 24-25, 28, 32-34, 43-48; App. 99a-103a; n. 7 *supra*.) One example is the denial of hospital privileges to petitioner Arthur because of JCAH standards:

> Jenkins [a hospital attorney] said that regardless of the discrepancies in the [hospital's] bylaws, the hospital had no other decision but to follow the rules of the JCAH [and deny hospital access to *petitioner Arthur*]. The board's attorney said that under JCAH regulations, there was 'no possible way' to grant temporary privileges [to *petitioner Arthur*]. Jenkins described the board's position as powerless in view of the JCAH rules. . . . He said that if the hospital is not accredited, the 'facility' would be in deep trouble. 'We may lose the entire staff,' Jenkins added. He said that there is no doubt that *Dr. Arthur* is qualified but that her professional field is not included in the JCAH criteria.'

(PX 353, emphasis added.) Moreover, the affirmed findings of threatened injury due to reduced demand, injury to reputation, and loss of professional referrals by reason of the AMA's boycott, require the same conclusion for the JCAH's identical and contemporaneous

(Footnote continued on following page)

With regard to petitioners' second theory both lower courts held that even though (1) the AMA had "manipulated" the JCAH to promulgate Standard X so as to expand its illegal boycott of chiropractors, (2) the JCAH had "cooperated" with the AMA in publishing and disseminating the "Right and Duty of Hospitals to Exclude Chiropractors," and (3) the JCAH had enforced both Standard X *and* AMA Principle 3 to exclude chiropractors from hospitals, that nevertheless, as a matter of law, no conspiracy between the JCAH and the AMA had been proved. (App. 41a-44a, 99a-110a.) Rather, both courts, relying on *Monsanto v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), concluded that no AMA/JCAH conspiracy existed because "the evidence falls short of establishing a conscious commitment to the [AMA's] scheme on the part of JCAH." (App. 36a-37a, 41a-44a, 98a, 103a.)

In support of this conclusion the trial court relied exclusively on the following: (1) there was no direct proof that the JCAH's 1964 publication of its own anti-chiropractic resolution was connected to the AMA, and (2) the JCAH Commissioners adopted Standard X, as proposed by the AMA, without discussing its application to chiropractors. (App. 38a, 42a-43a, 101a.) The court therefore held that the JCAH undertook all action "independently of the AMA boycott." (App. 39a.) In the words of the appellate court, petitioners failed to prove "that JCAH knowingly

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[11] *continued*

boycott. (App. 90a-97a, 24a-32a, 99a-103a, n. 7 *supra*.) The Seventh Circuit thus engaged in improper de novo fact finding on appeal for issues not even addressed by the district court. *Pullman-Standard v. Swint*, 456 U.S. 273, 291-93 (1982). This aspect of the Seventh Circuit decision therefore provides no basis for affirmance or avoidance of the limited issue of whether the JCAH standards constitute a conspiracy in and of themselves. *Id.* It also provides no basis for avoiding any of the other conspiracy issues presented by this Petition.

adhered to and participated in the AMA's unlawful boycott." (App. 42a.)

With regard to petitioners' first theory, the Seventh Circuit held that *Hydrolevel* was inapplicable on the grounds that it did not address "conscious parallelism" or the liability of an association for the conspiratorial acts of another. (App. 44a, n. 10.)

REASONS FOR GRANTING THE WRIT

Review by this Court is necessary because this case is of national importance to both the health care market and the antitrust laws as they apply to trade associations.

By bringing together numerous horizontal competitors, trade associations accumulate and exercise great economic power. The anticompetitive use of that power has traditionally been a cause of concern justifying close antitrust scrutiny. *E.g., Allied Tube & Conduit Corp. v. Indian Head, Inc.*, ___ U.S. ___, 108 S.Ct. 1931, 1937 (1988). Recently, the Deputy Director for the Bureau of Competition of the FTC stated that the agency would give added attention to trade association activity because "what appears to be legitimate conduct can be a cover for anticompetitive conduct." 58 Antitrust & Trade Reg. Rep. (BNA) 346 (March 8, 1990).

In light of the anticompetitive potential posed by trade associations, the decision below sets a particularly dangerous precedent. If not reversed, the decision will allow a powerful standard setting association in the health care field and numerous other trade associations to promulgate industry standards that prevent competition from competitors of their members. It will also allow an association member to manipulate and harness group economic power and direct it against a rival. Such conduct will be beyond the scope of the antitrust laws because the promulgation

of the industry standards will be regarded as unilateral conduct, and, so long as there is no direct evidence that the "association" knew of its member's lawless purpose, no conspiracy will be found.

The decision of the Seventh Circuit Court of Appeals not only raises important issues of antitrust policy, but also directly conflicts with the decision of this and other courts in the following respects:

A. The decision that the JCAH is not liable for a violation of §1 of the Sherman Act when it allows itself to be used as the mechanism through which its member effectuates an anticompetitive scheme is in conflict with this Court's ruling in *Hydrolevel*;

B. The decision that the JCAH did not conspire with the AMA misinterprets and unduly extends *Monsanto* and *Matsushita* so as to overrule *Interstate Circuit, Inc. v. U.S.*, 306 U.S. 208 (1939). This result is in direct conflict with *Hydrolevel* and the Third Circuit decision in *Arnold Pontiac-GMC Inc. v. Budd Bear, Inc.*, 826 F.2d 1335, 1338-39 (3rd Cir. 1987); and

C. The decision that JCAH standard X does not constitute a combination or conspiracy is in direct conflict with *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, ___ U.S. ___, 108 S.Ct. 1931, 1937 (1988), and numerous other decisions of this Court and the courts of appeals.

A. Exempting JCAH From Liability When It Is Used By Its Members To Further An Anticompetitive Boycott, Conflicts With *Hydrolevel*

1. Under *Hydrolevel*, The JCAH Entered Into A Conspiracy Or Combination, As A Matter of Law

In *Hydrolevel*, this Court addressed the liability of the American Society of Mechanical Engineers ("ASME"), a voluntary standard-setting association, for an antitrust violation perpetrated by one of its members, McDonnell &

Miller, Inc. ("M&M"). Specifically, Mr Hardin, an M&M employee, prepared a letter and had it sent, over the signature of another M&M employee, to ASME. The letter inquired as to whether the product of an M&M competitor (i.e., Hydrolevel) met the ASME safety code.

Mr. Hardin was chairman of the ASME subcommittee that had jurisdiction over that product, and he prepared an answer to his own inquiry condemning Hydrolevel's product. Hardin's answer was given to the Committee's Secretary who adopted it verbatim and sent it to M&M on ASME stationery without checking its accuracy. 456 U.S. at 561-63. As expected, M&M used the letter to discourage customers from buying Hydrolevel's product, and this Court held that "M&M successfully used its position within ASME in an effort to thwart Hydrolevel's competitive challenge." This Court described M&M's conduct as the "fraudulent manipulation" of the association. 465 U.S. at 575 n.13.

ASME claimed that it could not be liable for the illegal acts of its subcommittee chairman (Hardin) unless those acts were ratified by the association. This Court disagreed. It pointed out standard-setting associations enjoy great economic power and are "rife with opportunities for anticompetitive activity." *Id.* at 571, 574. It also held that the policies of the antitrust laws are best served by holding an association liable when its agents use such opportunities "to harm their employer's competitors through manipulation of [the Association] codes." *Id.* at 571, 572-73. Specifically, the Court stated:

> if . . . ASME is civilly liable for the antitrust violations of its agents acting with apparent authority, it is much more likely that similar antitrust violations will not occur in the future. '[P]ressure will be brought to bear on the [the organization] to see to it that [its] agents abide by the law.' [Citation omitted.] Only ASME can take systematic steps to make improper

> conduct on the part of all its agents unlikely, and the possibility of civil liability will inevitably be a powerful incentive for ASME to take those steps. Thus, a rule that imposes liability on the standard setting organization—which is best suited to prevent antitrust violations through the abuse of its reputation—is most faithful to the congressional intent that the private right of action deter antitrust violations.

In the current case, the opportunity to accomplish anticompetitive goals through the promulgation of Standard X was not seized by an "agent" of the association. Here, the JCAH's dominant member (the AMA) did not need to work through a JCAH agent who was also an AMA employee in order to perpetuate that anticompetitive act. Rather, the AMA was able to directly "manipulate" the JCAH industry standards to accomplish its anticompetitive goal. (App. 43a, 103a.) The AMA, as in *Hydrolevel*, was able to misuse the reputation and economic power of the association to accomplish its own illegal ends. As in *Hydrolevel*, the purposes of the antitrust laws are best served by making the association liable when a member uses the standard-setting machinery of the association to accomplish the member's illegal goals. This remains true even if the association neither ratifies nor shares the illegal intent. As in *Hydrolevel*, the JCAH is in the best position to protect against such misuse of its power, and the imposition of civil liability will "be a powerful incentive" for the JCAH to do so.

Moreover, in this case both lower courts agreed that Dr. Kessler, the Director of the JCAH Hospital Accreditation Program and an agent with both actual and apparent authority (Tr. 1681-87), "cooperated" with the AMA in publishing and distributing "The Right and Duty of Hospitals to Exclude Chiropractors." (App. 43a, 102a.) That article states that under the JCAH standards, association with the chiropractor is grounds for non-accreditation. (App. 157a-58a.)

This use of the JCAH's standard setting power in combination with the AMA and in furtherance of the AMA illegal scheme plainly subjects the JCAH to liability under *Hydrolevel*. It is the act of an association agent with apparent, and actual, authority to use the association's industry standards in conjunction with and in furtherance of a member's anticompetitive conspiracy. Under these facts, found and affirmed below, the JCAH conspired with the AMA, *as a matter of law*, under *Hydrolevel*. *Accord*, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 930 (1982) (association "may be held responsible for the acts of its agents throughout the country that are undertaken within the scope of apparent authority").

2. The Seventh Circuit Misinterpreted *Hydrolevel*

The Seventh Circuit disposed of *Hydrolevel* in a footnote. (App. 44a n.10.) The Court stated: "*Hydrolevel* speaks of an association's liability in its own right, not as a member of another's unlawful conspiracy. We thus believe *Hydrolevel* is inapplicable to this case."[12] (*Id.*)

The appellate court's reading of *Hydrolevel* is simply wrong.[13] The Second Circuit, in deciding *Hydrolevel*, repeatedly stated that the conspiracy at issue was *not* merely within the standard setting association, but rather was

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[12] The Seventh Circuit also stated that *Hydrolevel* is not a case of "conscious parallelism." (App. 44a n.10.) Plaintiff does not understand this apparent attempt at a distinction. This case does not present conscious parallel behavior either. The AMA drafted Standard X and requested the JCAH to adopt it. Having been "manipulated" by the AMA to extend the illegal boycott, the JCAH complied; it then enforced the Standard *and* AMA Principle 3, and "cooperated" with the AMA, to exclude chiropractors from hospitals. Such behavior is not conscious parallelism.

[13] To the extent that the Seventh Circuit correctly interpreted *Hydrolevel* as a case where the association standards themselves constituted the conspiracy, that holding is incompatible with the Seventh Circuit's simultaneous holding that the JCAH standards *do not* constitute a combination or conspiracy.

between the association and others. 635 F.2d at 124 (explaining that the jury found "that ASME had conspired with *others* to restrain trade"; and stating, "the . . . question . . . is whether ASME may be held liable as a conspirator [with M&M] because of the acts of its agents"). Indeed, as the dissent in this Court stated, the majority opinion holds "that ASME somehow has 'conspired' with McDonnell & Miller." 456 U.S. at 592.

Petitioners respectfully submit that *Hydrolevel* cannot be distinguished from the current facts. Here, as in *Hydrolevel*, an association member manipulated the industry standards of an association to exclude its competitors. In both cases, antitrust policy requires that the association be answerable for the harm caused by the abuse of its economic power. The contrary decision by the Seventh Circuit not only is wrong and in direct conflict with *Hydrolevel*, but is also dangerous. It removes the vigilance that standard-setting associations should be required to exercise in protecting against the anticompetitive manipulation of their enormous economic power.

B. The Decision That The JCAH Did Not Conspire With The AMA Gives An Impermissibly Broad Reading To *Monsanto* And *Matsushita*

The decision below seriously misinterprets and expands *Monsanto* and *Matsushita*. Specifically, the Seventh Circuit held this case was "governed under the standards set forth in *Monsanto* and *Matsushita*" (App. 42a) and that petitioners, therefore, had to produce evidence that "tends to exclude the possibility that the alleged conspirators were acting independently" and prove that the co-conspirators "had a conscious commitment to a common scheme designed to achieve an unlawful objective." (App. 36a-37a, 42a.) The Seventh Circuit then held that these tests were not met, as a matter of law, by the affirmed findings that: the AMA drafted Standard X and requested that the JCAH adopt it; the JCAH complied; the JCAH

was "manipulated by the AMA" to adopt Standard X to "promote and expand" the AMA's illegal boycott; and the JCAH enforced Standard X *and* AMA Principle 3, and also "cooperated" with the AMA, to exclude chiropractors from hospitals. (App. 42a-43a.) According to the Seventh Circuit, these findings did not tend to preclude the possibility of independent action or demonstrate a conscious commitment to an illegal scheme. (App. 42a-44a.) The Seventh Circuit reached this conclusion *solely* because the JCAH Commissioners did not discuss chiropractic when they adopted Standard X. (App. 38a, 43a.)

As demonstrated below, *Monsanto* and *Matsushita* are inapplicable to the current dispute. Furthermore, even if they are applicable, the facts as found and affirmed mandate a finding of conspiracy, as a matter of law.

1. *Monsanto* And *Matsushita* Are Inapplicable

Monsanto addressed "the standard of proof required to find a vertical price-fixing conspiracy" when a distributor is terminated by a manufacturer and other distributors have complained about his prices. 465 U.S. at 755. *Monsanto* holds that in such a case the conspiracy issue is difficult because the *Colgate* doctrine[14] allows a manufacturer to "announce its resale prices in advance and refuse to deal with those who fail to comply." *Id.* at 760. In a dealer termination case, it is therefore important to distinguish between independent action, acceptable under *Colgate*, and a conspiracy between the complaining distributors and the manufacturer. *Id.*

It was only due to the necessity of making that distinction, and the danger of infringing upon the *Colgate* doctrine, that *Monsanto* held that a vertical conspiracy between a manufacturer and a distributor cannot be "*inferred*" from circumstantial evidence unless the evidence

[14] *United States v. Colgate & Co.*, 250 U.S. 307 (1919).

tends to exclude the possibility of independent action and the plaintiff demonstrates a conscious commitment to a common scheme. *Id.* at 764.

In *Matsushita*, this Court considered an alleged conspiracy by manufacturers to charge below-cost predatory prices and lose money for over twenty years. The opinion points out that this claim was "implausible" and "simply makes no economic sense," and holds that under such circumstances plaintiff "must come forward with more persuasive evidence . . . than would otherwise be necessary." 475 U.S. at 587, 593-95. This Court also held that because the defendants lacked a rational motive to conspire that it would not allow an "*inference*" of conspiracy to be drawn from ambiguous evidence. *Id.* at 587, 595. The Court further held that *if there were* a "plausible reason to conspire ambiguous conduct *could* suffice." *Id.* at 597 n. 21 (emphasis added).

The stringent requirements for proof of conspiracy set forth in *Monsanto* and *Matsushita* have no application to the current dispute, and they do not undo this Court's holding in *Hydrolevel*. This case does not involve vertical price-fixing, dealer termination, or the *Colgate* doctrine. Nor does it involve an implausible conspiracy that makes no economic sense or is otherwise irrational. For precisely these reasons, the Third Circuit, in direct conflict with the decision below, refused to apply *Matsushita* and *Monsanto* to a horizontal boycott designed to exclude a competitor from the market. *Arnold Pontiac-GMC, Inc. v. Budd Baer, Inc.*, 826 F.2d 1335, 1338-39 (3rd Cir. 1987) (holding *Matsushita* and *Monsanto* are "of little or no applicability in this case because we are not faced with a terminated dealer or disappointed franchisee who . . . seeks to draw an inference [of conspiracy] from complaints by the dealer's competitors" and because "here, unlike [*Matsushita*] there was a 'plausible motive for the alleged concerted action.' ").

The majority of the Commissioners of the JCAH are, and represent, medical doctors who directly compete against chiropractors. (App. 37a, 99a-100a; PX 7106; Tr. 2558-59.) It is plausible and makes great economic sense for those medical physicians to conspire with the AMA to eliminate horizontal competition from chiropractors.

Furthermore, even if *Monsanto* and *Matsushita* do apply to horizontal conspiracies to eliminate competitors of the conspiring parties, neither case applies to direct and unambiguous, rather than inferential, proof of conspiracy. Here, petitioners directly proved, and the lower courts found, that the AMA drafted and requested that the JCAH promulgate Standard X and that the JCAH complied. Unless this Court's seminal decision in *Interstate Circuit, Inc. v. U.S.*, 306 U.S. 208, 226-27 (1939), was overruled *sub silentio* by *Monsanto* and *Matsushita*, these findings constitute a conspiracy, *as a matter of law*. Specifically, *Interstate Circuit* states:

> Acceptance of an invitation to participate in a plan the necessary consequences of which, if carried out, is restraint of interstate commerce is sufficient to establish an unlawful conspiracy
>
> . . . .
>
> it was enough that knowing concerted action was contemplated and invited, the [defendants] gave their adherence to the scheme and participated in it.

306 U.S. at 226-27.

In the current case, the AMA invited the JCAH to promulgate Standard X. The JCAH accepted the invitation and the consequence was a restraint of trade. Clearly, the JCAH knew that it was being asked to promulgate and adhere to Standard X, and it did so. Unless *Interstate Circuit* and *Hydrolevel* have been abandoned, the JCAH conspired with the AMA, as a matter of law.

2. Assuming Arguendo That *Monsanto* And *Matsushita* Apply, Petitioners Proved A Conspiracy, As A Matter Of Law

Even assuming that *Monsanto* and *Matsushita* apply to the current case, the facts, as found by both lower courts, necessarily constitute a conspiracy, *as a matter of law.*

Here, the fact that the AMA drafted Standard X, "urged" the JCAH to adopt it, and "the JCAH complied" (App. 38a, 43a), certainly *tends* to exclude the possibility that the JCAH independently promulgated Standard X. Secondly, it is undeniable that the JCAH consciously committed to promulgate and enforce Standard X. (App. 101a-02a, 144a-63a.) Indeed, the lower courts found that the JCAH did enforce Standard X and AMA Principle 3 by interpreting *both* of them as precluding accreditation for any hospital that associated with chiropractors. (*Id.*) Moreover, the JCAH affirmatively "cooperated" with the AMA to enforce the boycott by publishing and disseminating "The Right and Duty of Hospitals to Exclude Chiropractors."[15] (*Id.*) The fact that the JCAH Commissioners did not discuss chiropractors when they initially adopted Standard X in no way derogates these dispositive findings. (App. 101a.)

Indeed, it is legally irrelevant that the JCAH Commissioners did not discuss chiropractic in connection with its adoption of Standard X. In *Hydrolevel*, the association did not share, discuss, or know of M&M's anticompetitive intent, yet it was found to have conspired with its illegally motivated member.[16] As the Eleventh Circuit recently

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[15] "[C]oncerted efforts to *enforce* (rather than just agree upon) private product standards face more rigorous antitrust scrutiny." *Allied Tube*, 108 S.Ct. at 1937 n. 6.

[16] *Hydrolevel* also holds that an association should not be able to avoid liability by remaining "ignorant of its agents conduct." 456 U.S. at 573. Similarly, an association should not be able to avoid liability by remaining ignorant of its member's illegal intent.

held, in direct conflict with the decision below, an antitrust plaintiff need not prove that the alleged co-conspirator shared another's anticompetitive intent. It is sufficient that the co-conspirator intends to combine or agree and "the purported conspiracy has an anticompetitive effect." *Bolt v. Halifax Hospital Medical Center*, 891 F.2d 810, 819-820 (11th Cir. 1990). As *Bolt* states, the plaintiff need only prove "an intent to adhere to an agreement . . . but the evidence need not show the co-conspirators specifically intended to restrain trade." *Id.*

In the current case, the Seventh Circuit held that the JCAH did not conspire with the AMA because its Commissioners did not discuss chiropractic when it adopted Standard X. (App. 38a.) At most, this might indicate that the JCAH did not share the full extent of the AMA's anticompetitive intent. (*But see* App. 143a-63a.) Under *Hydrolevel*, however, that does not preclude a finding of conspiracy.

C. Industry Standards Adopted By The JCAH Constitute A Combination Or Conspiracy

The Seventh Circuit held that the industry standards adopted by the JCAH did not in themselves constitute a combination or conspiracy. In reaching this conclusion, the Seventh Circuit relied on *Consolidated Metal*, 846 F.2d at 284 (5th Cir. 1988).

In *Consolidated Metals*, a standard setting trade association was sued for refusing to certify plaintiff's product. The Fifth Circuit agreed that a trade association "by its nature involves collective action by competitors," but nonetheless held that an association is not "a walking conspiracy" and that not all standards adopted by the association are combinations or conspiracies.[17] *Id.* at 293. The

[17] The Fifth Circuit, like the Seventh Circuit below, mistakenly held that plaintiff had not complied with *Matsushita* because it did not present evidence tending to prove that the association's adoption of an industry standard was not independent action. *Id.* at 294 n.32.

Fifth Circuit further held that no combination or agreement could be found unless there was proof that the association's standard-setting activity was "merely a ploy to obscure" an illegal scheme. *Id.* at 294.

The Seventh Circuit agreed with and followed *Consolidated Metals*. It held that "a trade association is not, just because it involves collective action by competitors a 'walking conspiracy.' " (App. 41a.) Because the court found that the JCAH accreditation program was not "merely a ploy to obscure a conspiracy against chiropractors" it held that the promulgation of Standard X did not amount to a combination or conspiracy. *Id.*

The holdings of the Seventh and Fifth Circuits are wrong and in direct conflict with this Court's ruling in *Allied Tube*, 108 S.Ct. at 1937-38. In actuality, every standard-setting act by an association is a combination or conspiracy. That does not, of course, mean that every industry standard violates the Sherman Act. Quite the contrary, only those that are unreasonably anticompetitive violate the statute. *Id.* But, every industry standard promulgated by a trade association, fulfills the conspiracy, combination, or agreement element of §1 of the Sherman Act.

In *Allied Tube* the plaintiff complained that members of the National Fire Protection Association, a private voluntary trade association, conspired in order to prevent approval of plaintiff's product under the association's industry code. This Court stated that the context of the case was "the standard setting process of a private association." *Id.* at 1937. This Court then stated that "trade and standard setting associations [are] routinely treated as continuing conspiracies of their members." *Id.*[18]

[18] In making this statement Justice Brennan relied on 7 P. Areeda, Antitrust Law ¶ 1477 p. 343 (1983). Professor Areeda therein stated: "Although the issue is seldom discussed, trade associations

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In keeping with *Allied Tube* this Court has repeatedly treated standards adopted by trade associations as combinations or agreements among the associations members which satisfy the conspiracy element of §1 of the Sherman Act. *E.g., National Society of Professional Engineers v. U.S.*, 435 U.S. 679, 681 (1978); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

In the current case, the JCAH is a standard setting association. (App. 37a, 99a-100a.) Its members represent medical doctors who compete against each other and chiropractors. (*Id.*, 18a-19a, 72a, 120a, 129a.) Indeed, the majority of the JCAH Commissioners are practicing medical physicians. (PX 7106; Tr. 2558-59.) Rules promulgated by this association necessarily constitute a combination or conspiracy—as did the rules promulgated by the engineers in *Professional Engineers*, and the rules promulgated by the Virginia State Bar Association in *Goldfarb*.

The decision below and that of the Fifth Circuit in *Consolidated Metal* are in conflict with controlling law. Until explicitly disapproved, however, they constitute a threat to antitrust enforcement and a possible escape route for those who would abuse the horizontal group power of an association to destroy competition.

D. This Case Is Of Paramount National Significance

This case and the role of the JCAH have generated a remarkable amount of antitrust commentary.[19] For exam-

[18] *continued*
are routinely treated as continuing conspiracies of their members, as are bodies promulgating rules or standards, for competitive conduct of their members."

[19] E.g., C. Havighurst, *Doctors and Hospitals: An Antitrust Perspective on Traditional Relationships*, 1984 Duke L.J. 1071, 1087-91, 1101 & n. 95, 1102-03 & nn. 97 & 101, 1106 n.109, 1108 n.112 (1984); P. Kissam, *Antitrust Boycott Doctrine*, 69 Iowa L. Rev. 1165, 1192 n.172, 1196 n.198, 1211 & n.292, 1213-65 (1984)

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ple, Professor Havighurst, a leading authority in health care antitrust law, has explained:

> The organizational characteristics [for hospitals] . . . are not the result of considered choices by hospital managers about how best to organize and operate a hospital. Nor is the reason why nearly all hospitals are organized in essentially the same fashion to be found in the operation of the market's invisible hand. Instead it appears that hospitals' internal structures have been prescribed by the Joint Commission on Accreditation of Hospitals (JCAH), a body dominated by representatives of powerful medical organizations. . . . We should not be surprised to find that hospitals,

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[19] *continued*

("JCAH hospital accreditation standards . . . discourage the grant of hospital privileges to independent clinical psychologists" and other providers); R. Heidt, *Industry Self-Regulation and the Useless Concept "Group Boycott"*, 39 Vand. L. Rev. 1508, 1510, 1527 n.72, 1553 n.157, 1565 n.202, 1594 (1986) ("In contrast, one might expect liability in *Wilk* [citation omitted], when the Joint Commission on Accreditation of Hospitals went beyond expressing its views about chiropractors and pressured presumably neutral hospitals into denying chiropractors use of their facilities"); C. Havighurst & N. King, *Private Credentialing of Health Care Personnel: An Antitrust Perspective*, 9 Am. J. L. & Med. 263, 288-89, 323-24, 333-34 (1983) (citing *Wilk* as an example, "The claim that clinical decisions are dictated by science—and never by habit or folklore or economic self interest—has served the [medical] profession well in maintaining its authority and in building ideological resistance to any development threatening that authority"); Miles & Philp, *Hospitals Caught in the Antitrust Net*, 24 Duq. L. Rev. 489, 503-04 (1985) ("the [JCAH] procedure used to grant or deny privileges to a practitioner has substantial *potential* for competitive abuse. To some extent, it puts the 'fox in the chicken coop.' In many instances, direct competitors will have substantial input (and in some cases have de facto decision-making authority) with regard to the practitioner's application"); T. Jost, *The Joint Commission on Accreditation of Hospitals: Private Regulation of Health Care in the Public Interest*, 24 B.C. L. Rev. 835, 874 (1983); Comment, *Group Boycotts by Heath Care Professionals: Is the Per Se Rule An Appropriate Standard of Antitrust Analysis Under the Sherman Act*, 11 Dayton L. Rev. 45, 84-85, 90-91 (1985); Note, *Denial of Hospital Admitting Privileges for Non Physician Providers—A Per Se Violation?* 60 N.D. L. Rev. 724, 736, 741-44 (1984).

> as designated by the JCAH, unduly serve the interests of physicians.
>
> . . . .
>
> The possibility that decisionmaking in hospitals is unduly dominated by physicians is a policy problem that cuts across the entire spectrum of hospital behavior, eventually linking up with major concerns about whether society's scarce resources are being diverted from their best uses into wasteful forms of health care.

Havighurst, 1984 Duke L.J. at 1071, 1087, 1091.

Similarly Professor Jost has stated:

> JCAH accreditation is a powerful tool for limiting competition against physicians in the hospital setting and thus for limiting competition against physicians generally. JCAH may, by thus restraining competition, increase the cost of health care. . . .
>
> . . . the effects of JCAH standards on alternative health care providers are anticompetitive. JCAH standards restrict significantly the role of non-physician practitioners in hospital settings. . . .
>
> . . . the JCAH accreditation program could be characterized as a concerted effort of physicians, the JCAH, and other professional organizations to compel hospitals to refuse to deal with non-physician practitioners and their patients.
>
> . . . [within the health institution accreditation market] JCAH has no substantial competition and arguable monopoly power.

Jost, 24 B.C. L. Rev. at 874, 876, 882, 892, 909, 911, 923.

In view of the growing crisis in health care costs, the concerns identified by Professors Jost and Havighurst are more crucial now than ever before. These concerns are dramatically presented by the current case where the defendant, the JCAH, is "the most promising candidate for challenge as an anticompetitive joint venture" among the AMA, AHA, ACS, and ACP. Havighurst & King, 9 J. Am. L. & Med. at 323.

As the *AHA's* counsel and Vice President explained in a speech to the National Health Lawyer's Association in 1984, this case and the questions presented are vitally important to the health care field:

> Note the fact that the Joint Commission is a private sector undertaking, voluntarily created by the five sponsoring organizations and so conducting its affairs. Note the fact that the matters on which it has agreed were negotiated among the professional organizations which sponsor it. The changes, in other words, were not ordained by some higher authority. Note the fact that the policy makers of the Joint Commission are professionals [predominantly medical physicians] in their calling. They are not public regulators. . . . The *Wilk* case, which you have heard about, represents an actual challenge of what was the status quo. It's not a hypothetical situation.

Epstein, *Access for the Non-Physician Practitioner* (PX 7133).

CONCLUSION

This is the preeminent pending case in the antitrust health care field. It presents the Court with the unique opportunity to determine whether the most powerful private association in health care today should be immune from liability when it is manipulated by its members for anticompetitive ends. For all the foregoing reasons, petitioners respectfully request that this Court grant this Petition For Certiorari and review the decision below.

Respectfully submitted,

PAUL E. SLATER
CHRISTOPHER J. MURDOCH
SPERLING, SLATER & SPITZ

GEORGE P. McANDREWS
(Counsel of Record)
ROBERT C. RYAN
McANDREWS, HELD
& MALLOY, LTD.

Counsel for Petitioners